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| <b>Lupton &amp; Luce, Inc. v Scherer</b>   |
| 2013 NY Slip Op 30888(U)   |
| April 11, 2013   |
| Supreme Court, Suffolk County  |
| Docket Number: 14972/2012  |
| Judge: Joseph Farneti  |
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SUPREME COURT - STATE OF NEW YORK  
I.A.S. TERM, PART 37 - SUFFOLK COUNTY

**COPY**

**PRESENT:**

**HON. JOSEPH FARNETI**  
**Acting Justice Supreme Court**

\_\_\_\_\_  
LUPTON & LUCE, INC.,

Plaintiff,

-against-

LAURA SCHERER and THOMAS K.  
REGNIER,

Defendants.  
\_\_\_\_\_

ORIG. RETURN DATE: MAY 30, 2012  
FINAL SUBMISSION DATE: JUNE 28, 2012  
MTN. SEQ. #: 001  
MOTION: MG

ORIG. RETURN DATE: JUNE 14, 2012  
FINAL SUBMISSION DATE: JUNE 28, 2012  
MTN. SEQ. #: 002  
MOTION: MD

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Upon the following papers numbered 1 to 10 read on these motions \_\_\_\_\_  
**FOR A PRELIMINARY INJUNCTION AND TO DISMISS** \_\_\_\_\_  
Order to Show Cause and supporting papers 1-3; Affirmation in Opposition and supporting  
papers 4, 5; Notice of Motion and supporting papers 6-8; Reply Affirmation and Affidavit  
9, 10; it is,

**ORDERED** that this motion (seq. #001) by plaintiff LUPTON & LUCE, INC. for an Order:

(1) as to defendant LAURA SCHERER:

(a) enjoining her from directly or indirectly making use of any of plaintiff's proprietary and confidential information, including, but not limited to customer lists, customer information, and insurance account information; and

(b) enjoining her through June 21, 2013, from directly or indirectly, on her own behalf or as an employee, associate or co-owner with anyone else, soliciting or attempting to obtain or accept any insurance business of any nature from any customer or account on the books of plaintiff as of June 21, 2011, or from any person, firm or corporation the insurance business of which had been solicited on behalf of plaintiff by her or anyone in plaintiff's employ during the period from June 22, 2010 through June 21, 2011; and

(c) enjoining her from directly or indirectly aiding or assisting anyone in soliciting or accepting insurance business of any nature from any person, firm or corporation in the insurance business of which had been solicited on behalf of plaintiff by her or anyone in plaintiff's employ during the period from June 22, 2010 through June 21, 2011;

(2) as to defendant THOMAS K. REGNIER:

(a) enjoining him directly or indirectly from making use of any of plaintiff's proprietary and confidential information, including, but not limited to customer lists, customer information, and insurance account information; and

(b) enjoining him directly or indirectly, on his own behalf or as an employee, associate or co-owner with anyone else, from soliciting or accepting any insurance business of any nature from any customer or account on the books of plaintiff as of June 21, 2011, or from any person, firm or corporation the insurance business of which had been solicited on behalf of plaintiff by him or anyone in plaintiff's employ during the period from June 22, 2010 through June 21, 2011,

is hereby **GRANTED** as set forth hereinafter; and it is further

**ORDERED** that this motion (seq. #002) by defendant THOMAS K. REGNIER for an Order, pursuant to CLR 3211 (a) (1), (5) and (7), dismissing the

verified complaint with prejudice against defendant THOMAS K. REGNIER, is hereby **DENIED** for the reasons set forth hereinafter.

Plaintiff commenced this action on May 15, 2012, by summons and complaint, seeking to enjoin defendants, both former employees of plaintiff, from using plaintiff's confidential and proprietary information. On even date, the Court (Pastorella, J.) issued the following temporary restraining Order:

ORDERED, that pending the return date of this motion or the adjourned date thereof, the defendant LAURA SCHERER be and the same hereby is enjoined, restrained, and prohibited from:

1. directly or indirectly making use of any of plaintiff's proprietary and confidential information, including, but not limited to customer lists, customer information, and insurance account information; and
2. directly or indirectly, on her own behalf or as an employee, associate or co-owner with anyone else, soliciting or attempting to obtain or accept any insurance business of any nature from any customer or account on the books of plaintiff as of June 21, 2011, or from any person, firm or corporation the insurance business of which had been solicited on behalf of the plaintiff by her or anyone in plaintiff's employ during the period from June 22, 2010 through June 21, 2011; and
3. from directly or indirectly, aiding or assisting anyone in soliciting, attempting to obtain or accept insurance business of any nature from any person, firm or corporation the insurance business of which had been solicited on behalf of the plaintiff by her or anyone in plaintiff's employ during the period from June 22, 2010 through June 21, 2011; and it is further

ORDERED, that pending the return date of this motion or the adjourned date thereof, the defendant THOMAS K. REGNIER be and the same hereby is enjoined, restrained, and prohibited from:

1. directly or indirectly making use of any of plaintiff's proprietary and confidential information, including, but not limited to customer lists, customer information, and insurance account information; and
2. directly or indirectly, on his own behalf or as an employee, associate or co-owner with anyone else, solicit, attempt to obtain or accept any insurance business of any nature from any customer or account on the books of the plaintiff as of June 21, 2011, or from any person, firm or corporation the insurance business of which had been solicited on behalf of the plaintiff by her or anyone in plaintiff's employ during the period from June 22, 2010 through June 21, 2011.

After oral argument held on June 28, 2012, this Court continued the temporary restraining Order pending the determination of the instant motion.

Plaintiff alleges that defendant LAURA SCHERER ("Scherer") is bound by an Employment Agreement, dated January 28, 2010, that prohibits, among other things, her disclosure and direct or indirect use of plaintiff's confidential and proprietary information ("Employment Agreement"). Such confidential and proprietary information, according to plaintiff, includes plaintiff's customers and their contact information. Further, Scherer is prohibited from soliciting, either directly or indirectly, plaintiff's customers for a period of two years following the termination of her employment pursuant to the Employment Agreement. Plaintiff claims that Scherer's employment terminated on June 21, 2011, whereupon she gained employment with the Cotgreave Insurance Agency, a competitor of plaintiff, along with co-defendant THOMAS K. REGNIER ("Regnier"). Thereafter, defendants allegedly solicited plaintiff's customers and utilized plaintiff's confidential information. As such, plaintiff now seeks a preliminary injunction as described hereinabove. In support thereof, plaintiff has submitted, among other things, an undated solicitation letter from Regnier to a potential customer, "Debbie Davis" of "Island Hardscapes," wherein Regnier offers to review Ms. Davis' insurance coverage in order to "either improve the cost or strengthen the coverage." The letter is signed at the bottom by Regnier of "Cotgreave Insurance Agency Inc.," but is on letterhead stating "Tom Regnier Medicare Supplement & Dental Plans," and "Property & Casualty Auto, Homeowners and Commercial," with Regnier's home address in East Moriches.

In opposition hereto, Scherer acknowledges that she was a former employee of plaintiff, that she entered into the Employment Agreement, and that she thereafter began employment with Cotgreave Insurance Agency, but otherwise denies each and every allegation of plaintiff. Scherer alleges that she has not breached the Employment Agreement, and that the Employment Agreement itself is unreasonable and unenforceable as it prohibits Scherer from working in her capacity as a customer service representative in the insurance industry. Moreover, Scherer indicates that she did not sign the letter addressed to Ms. Davis, did not direct Regnier to send the letter, and has not solicited any of plaintiff's customers. Notably, Scherer informs the Court that she merely earns a fixed salary as a customer service representative, and would not earn commission or other compensation if she were to bring in new customers to her current firm. Thus, Scherer argues that plaintiff has not sustained its burden for the issuance of a preliminary injunction. In support thereof, Scherer has submitted, among other things, her own affidavit.

Regnier has filed a motion to dismiss the complaint against him, alleging that he was also a former employee of plaintiff who was "suddenly" terminated on July 20, 2009. Regnier indicates that he signed an Employment Agreement with plaintiff in or about January of 2009, but that the period of non-solicitation therein ended on July 21, 2011. Regnier contends that he never breached any of the terms of his Employment Agreement. Regnier informs the Court that he began working as an independent insurance broker from his home, and entered into a Broker Agreement with Cotgreave Insurance Agency on or about July 12, 2011, so he could place his customer's insurance needs through Cotgreave. Based upon the foregoing, Regnier argues that he was not prohibited whatsoever from sending the letter to Ms. Davis, which he indicates was sent on or about April 26, 2012, and was unaware whether Ms. Davis was a customer of plaintiff. Moreover, Regnier denies that Scherer ever provided him with plaintiff's proprietary information; that Scherer had no idea he sent that letter; and that he was never an employee of Cotgreave.

Regarding that branch of Regnier's motion to dismiss pursuant to CPLR 3211 (a) (1), where a defendant moves to dismiss an action asserting the existence of a defense founded upon documentary evidence, the documentary evidence "must be such that it resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim" (*Trade Source, Inc. v Westchester Wood Works, Inc.*, 290 AD2d 437 [2002]; see *Del Pozo v Impressive Homes, Inc.*, 29 AD3d 621 [2006]; *Montes Corp. v Charles Freihofer Baking Co.*, 17 AD3d 330 [2005]; *Berger v Temple Beth-El of Great Neck*, 303 AD2d 346 [2003]). Here, it cannot be said that the documentary evidence submitted, to wit:

Regnier's Employment Agreement executed in or about January 1, 2009, resolves all factual issues as a matter of law and conclusively disposes of the plaintiff's claim. Despite Regnier's contentions, plaintiff is not attempting to enforce said Agreement against Regnier; instead, plaintiff has named Regnier as a defendant herein alleging that Regnier has received plaintiff's confidential information from Scherer, and has improperly used such information to solicit plaintiff's customers.

On a motion to dismiss for failure to state a cause of action pursuant to CPLR 3211 (a) (7), the complaint must be construed in the light most favorable to the plaintiff and all factual allegations must be accepted as true in determining whether the complaint states any legally cognizable cause of action (see *Grand Realty Co. v City of White Plains*, 125 AD2d 639 [1986]; *Barrows v Rozansky*, 111 AD2d 105 [1985]; *Holly v Pennysaver Corp.*, 98 AD2d 570 [1984]). Here, plaintiff's claim against Regnier, although not explicitly stated, is for unfair competition based upon the alleged bad faith misappropriation of a commercial advantage belonging to another "by exploitation of proprietary information or trade secrets" (*Beverage Mktg. USA v S. Beach Bev. Co.*, 20 AD3d 439 [2005]; *Eagle Comtronics v Pico Prods.*, 256 AD2d 1202 [1998]). Under this theory, the allegations that Regnier exploited proprietary information and trade secrets acquired by Scherer during her employment with plaintiff, are sufficient to state a cause of action for unfair competition (see *Beverage Mktg. USA v S. Beach Bev. Co.*, 20 AD3d 439, *supra*; *Bender Ins. Agency v Treiber Ins. Agency*, 283 AD2d 448 [2001]; *CBS Corp. v Dumsday*, 268 AD2d 350 [2000]).

In view of the foregoing, this motion by Regnier to dismiss the complaint as asserted against him is **DENIED**.

With respect to plaintiff's motion, since a preliminary injunction prevents litigants from taking actions that they would otherwise be legally entitled to take in advance of an adjudication on the merits, it is considered a drastic remedy which should be issued cautiously (see *Uniformed Firefighters Assn. of Greater N.Y. v City of New York*, 79 NY2d 236 [1992]; *Gagnon Bus Co., Inc. v Vallo Transp., Ltd.*, 13 AD3d 334 [2004]; *Bonnieview Holdings v Allinger*, 263 AD2d 933 [1999]). Thus, in order to obtain a preliminary injunction, a moving party must demonstrate: (1) a likelihood of success on the merits; (2) an irreparable injury absent the injunction; and (3) a balancing of the equities in its favor (see CPLR 6301; *Aetna Ins. Co. v Capasso*, 75 NY2d 860 [1990]; *Iron Mtn. Info. Mgt., Inc. v Pullman*, 41 AD3d 656 [2007]; *Gerstner v Katz*, 38 AD3d 835 [2007]). To sustain its burden of demonstrating a likelihood of success on the merits, the movant must demonstrate a clear right to relief which is plain from the

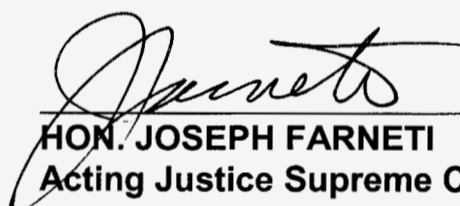
undisputed facts (see *Gagnon Bus Co., Inc. v Vallo Transp., Ltd.*, 13 AD3d 334, *supra*; *Dental Health Assoc. v Zangeneh*, 267 AD2d 421 [1999]; *Blueberries Gourmet v Aris Realty Corp.*, 255 AD2d 348 [1998]).

The Court has weighed the elements necessary for the granting of a preliminary injunction, and finds that plaintiff has sustained its burden. Although the parties' submissions demonstrate that the underlying facts are disputed herein, it is undisputed that the Employment Agreement provides for injunctive relief "upon any actual, impending, threatened or inevitable violation of [the] Agreement." Scherer is subject to the Employment Agreement until June 21, 2013. Further, although defendants contend that they have not acquired or disseminated any of plaintiff's proprietary or secret information, the letter to Ms. Davis references former employees of plaintiff who apparently handled Ms. Davis' account with plaintiff, including Scherer. In addition, the emails submitted by Regnier indicate that defendants corresponded with each other about Ms. Davis' insurance position, and reference a "Mark," who plaintiff alleges was also involved with Ms. Davis' account at plaintiff. As such, plaintiff argues that Regnier would not otherwise have such information unless Scherer provided it to him.

In view of the foregoing, plaintiff's motion is **GRANTED** to the extent that the temporary restraining Order heretofore granted on May 15, 2012 (Pastoressa, J.), is hereby continued pending further Order of the Court.

The foregoing constitutes the decision and Order of the Court.

Dated: April 11, 2013

  
HON. JOSEPH FARNETI  
Acting Justice Supreme Court

\_\_\_\_ FINAL DISPOSITION

X  NON-FINAL DISPOSITION